



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2011-0227; FRL-9681-7]

Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; New Source Review; Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve multiple revisions to the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ), to EPA in two submittals dated June 1, 2009, and February 8, 2011. These proposed revisions were submitted by KDAQ on behalf of the Louisville Metro Air Pollution Control District (LMAPCD), (also referred to as Jefferson County) and modifies the LMAPCD New Source Review (NSR) Prevention of Significant Deterioration (PSD) permitting regulations. The proposed revisions incorporate by reference (IBR) federal NSR PSD requirements promulgated in the Greenhouse Gas (GHG) Tailoring Rule (hereafter referred to as the “GHG Tailoring Rule”), requirements for the fine particulate matter (also known as PM_{2.5}) national ambient air quality standards (NAAQS) as amended in EPA’s 2008 NSR PM_{2.5} Implementation Rule (hereafter referred to as the “NSR PM_{2.5} Rule”), the 1997 8-Hour Ozone NAAQS Implementation Rule NSR Update Phase II (hereafter referred to as the “Phase II Rule”), and the 2002 NSR Reform Rule, into the Jefferson County portion of the

Kentucky SIP. EPA is proposing approval of Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions because the Agency has determined that these SIP revisions are in accordance with the Clean Air Act (CAA or Act) and EPA regulations regarding the PSD permitting program.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2011-0227 by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: EPA-R04-OAR-2011-0227, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. “EPA-R04-OAR-2011-0227.” EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Jefferson County portion of the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: bradley.twunjala@epa.gov. For information regarding the GHG Tailoring Rule, 2002 NSR Reform and NSR PM_{2.5} Rule, contact Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562-9214; e-mail address: adams.yolanda@epa.gov. For information regarding the Phase II Rule and ozone NAAQS, contact Jane Spann, Regulatory Development Section, at the same address above. Ms. Spann's telephone number is (404) 562-9029; e-mail address: spann.jane@epa.gov. For information regarding the PM_{2.5} NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the

same address above. Mr. Huey's telephone number is (404) 562-9104; e-mail address:

huey.joel@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. What Actions are Proposed in this Notice?**
- II. What is EPA's Proposed Action for GHG-Emitting Sources?**
- III. What is EPA's Proposed Action for the NSR PM_{2.5} Rule?**
- IV. What is EPA's Proposed Action for the Phase II Rule?**
- V. What are EPA's Proposed Actions for NSR Reform and Reasonable Possibility?**
- VI. What is EPA's Proposed Action for the Automatic Rescission Clause?**
- VII. Proposed Actions**
- VIII. Statutory and Executive Order Reviews**

I. What Actions are Proposed in this Notice?

On June 1, 2009, and February 8, 2011, the Commonwealth of Kentucky through the KDAQ (and on behalf of LMAPCD) submitted two SIP revisions to EPA for approval into the Jefferson County portion of the Kentucky SIP to adopt federal NSR PSD permitting requirements. The SIP revisions consist of changes to the LMAPCD Air Quality Regulations, Regulation 2 Permit Requirements: Regulation 2.05 – Prevention of Significant Deterioration of Air Quality and address several NSR PSD permitting requirements promulgated at 40 CFR

52.21. Specifically, the June 1, 2009, SIP revision: (1) incorporates provisions for implementing the PSD program for the PM_{2.5} NAAQS as promulgated in the NSR PM_{2.5} Rule,¹ 73 FR 28321 (May 16, 2008); (2) adopts PSD provisions related to the implementation of the 1997 8-hour ozone Phase II Rule including nitrogen oxides (NO_x) as a precursor to ozone, 70 FR 71612 (November 29, 2005); and (3) adopts federal PSD regulations established in the 2002 NSR Reform Rules, 67 FR 80186 (December 31, 2002) and the NSR Reasonable Possibility Rule, 72 FR 72607 (December 21, 2007). These PSD permitting provisions became effective in Jefferson County on May 20, 2009. The February 8, 2011, SIP revision provides Jefferson County with the authority to regulate GHG under its PSD program and establishes appropriate emission thresholds for determining which new stationary sources and modification projects become subject to LMAPCD's PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule, 75 FR 31514 (June 3, 2010). These GHG PSD applicability provisions became effective in Jefferson County on November 17, 2010. In addition, the February 8, 2011, submittal adopts a provision that would automatically render Jefferson County's Regulation 2.05 or a portion thereof invalid in the wake of certain court decisions or other events (the "automatic rescission clause"). Approval of Jefferson County's GHG permitting regulations also includes a proposal to simultaneously rescind the federal implementation plan (FIP) that EPA promulgated on January 14, 2011. *See* 76 FR 2581. For more information on the Jefferson County FIP see Section II of this rulemaking. Pursuant to

¹ With respect to the NSR PM_{2.5} Rule, Phase II Rule and NSR Reform, Jefferson County's SIP revisions only address PSD requirements at Regulation 2.05. The nonattainment NSR (NNSR) provisions for Jefferson County (Regulation 2.04) for these provisions are still under development by LMAPCD.

section 110 of the CAA, EPA is proposing to approve these changes into the Jefferson County portion of the Kentucky SIP.

In addition to incorporating the changes discussed above, Jefferson County's SIP revisions also include PSD permitting provisions that: (1) exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the major NSR source permitting program as amended in the Ethanol Rule, 72 FR 24060 (May 1, 2007); and (2) IBR changes pursuant to EPA's Fugitive Emissions Rule, 73 FR 77882 (December 19, 2008).² In today's proposed rulemaking, EPA is not proposing to take action on LMAPCD's changes to its PSD regulations to adopt provisions promulgated in the Ethanol Rule nor is EPA proposing to take action on LMAPCD's changes to incorporate the provisions of the Fugitive Emission Rule.

LMAPCD IBR the federal PSD permitting requirements found at 40 CFR 52.21 to update its permitting program at Regulation 2.05. Jefferson County's practice for revising its PSD regulations is to IBR into its SIP the version of the Code of Federal Regulations (at 40 CFR 52.21) that is in effect as of a specified date. LMAPCD's Regulation 2.05 contains the preconstruction review program that provides for the prevention of significant deterioration of ambient air quality as required under part C of title I of the CAA (the PSD program). Jefferson

² On March 31, 2010, EPA stayed the Fugitive Emissions Rule (73 FR 77882) for 18 months to October 3, 2011, to allow the Agency time to propose, take comment and issue a final action regarding the inclusion of fugitive emissions in NSR applicability determinations. This stay was established as a result of EPA granting the Natural Resource Defense Council's petition for reconsideration on the original Fugitive Emissions Rule. *See* 73 FR 77882 (December 19, 2008). On March 30, 2011 (76 FR 17548), EPA proposed an interim rule which superseded the March 31, 2010, stay and clarified and extended the stay of the Fugitive Emission Rule until EPA completes its reconsideration. The interim rule simply reverts the CFR text back to the language that existed prior to the Fugitive Emissions Rule changes in the December 19, 2008, rulemaking. EPA plans to issue a final rule affirming the interim rule as final. The final rule will remain in effect until EPA completes its reconsideration.

County's June 1, 2009, SIP revision, which provided version 9 of LMAPCD's Regulation 2.05, IBR the federal PSD regulations as set forth at 40 CFR 52.21, and as amended as of July 1, 2008. Subsequently, the February 8, 2011, SIP revision, which provided version 10 of LMAPCD's Regulation 2.05, IBR federal PSD regulations as set forth at 40 CFR 52.21, and as amended as of July 1, 2010, thereby superseding version 9 of Regulation 2.05. Throughout this rulemaking, EPA will refer to the June 1, 2009, and February 8, 2011, SIP revisions as the "Jefferson County's SIP revisions."

II. What is EPA's Proposed Action for GHG-Emitting Sources?

On February 8, 2011, KDAQ submitted a request to EPA to approve changes to the Jefferson County portion of the Kentucky SIP to incorporate federal requirements for NSR PSD permitting. These adopted rules became effective in Jefferson County on November 17, 2010. These amendments provide Jefferson County with the authority to regulate GHG under its PSD program and establish PSD applicability thresholds for GHG emissions in LMAPCD's PSD regulations at the same emissions thresholds and in the same timeframes as those specified by EPA in the GHG Tailoring Rule. By incorporating the GHG Tailoring Rule thresholds into the Jefferson County portion of the Kentucky SIP, KDAQ is ensuring that smaller GHG sources emitting less than these thresholds will not be subject to PSD permitting requirements for their GHG emissions. In today's action, pursuant to section 110 of the CAA, EPA is proposing to approve these changes into the Jefferson County portion of the Kentucky SIP.³ Approval of

³ The GHG Tailoring Rule also applies to the title V program, which requires operating permits for existing sources. However, today's action does not affect LMAPCD's title V program.

Jefferson County’s GHG permitting regulations also includes a proposal to simultaneously rescind the FIP that EPA promulgated on January 14, 2011. *See* 76 FR 2581. More information regarding Jefferson County’s FIP is summarized below. This section briefly summarizes EPA’s GHG-related actions that provide the background for today’s proposed action. More detailed discussion of the background is found in the preambles for those actions cited herein.

A. Background

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part are distinct from one another, establish the overall framework for today’s final action on the Jefferson County portion of the Kentucky SIP. Four of these actions include, as they are commonly called, the “Endangerment Finding” and “Cause or Contribute Finding,”⁴ which EPA issued in a single final action; the “Johnson Memo Reconsideration;”⁵ the “Light-Duty Vehicle Rule;”⁶ and the “Tailoring Rule.” Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took

⁴ “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.” 74 FR 66496 (December 15, 2009).

⁵ “Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17004 (April 2, 2010).

⁶ “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324 (May 7, 2010).

this last action in the GHG Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources. In the GHG Tailoring Rule, EPA tailored the applicability criteria that determine which GHG emission sources become subject to the PSD program of the CAA to relieve overwhelming permitting burdens that would, in the absence of the rule, fall on permitting authorities and sources. *See* 75 FR 31514, (June 3, 2010). As EPA explained in the GHG Tailoring Rule, the threshold limitations are necessary because without them PSD would apply to all stationary sources that emit or have the potential to emit more than 100 or 250 tons of GHG per year as of January 2, 2011. January 2, 2011, was the date when EPA’s Light-Duty Vehicle Rule took effect, imposing control requirements for the first time on carbon dioxide and other GHGs. EPA asked permitting authorities to confirm that they would follow this implementation approach for their programs, and if they could not, to notify EPA so that the Agency could take appropriate follow-up action to narrow⁷ federal approval of their programs before GHGs became subject to PSD permitting on January 2, 2011. *See* 75 FR at 31518.

Recognizing that some states had SIP-approved PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these states, a FIP. On December 13, 2010, EPA finalized the rulemaking entitled “Action to Ensure Authority to Issue Permits Under the

⁷ On December 30, 2010, (75 FR 82536) EPA promulgated the rule entitled “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule; (the “Narrowing Rule”). In the Narrowing Rule, EPA explained that by “narrowing” its prior approval of a SIP-approved PSD program, EPA could ensure that for federal purposes, GHG sources below the Tailoring Rule’s thresholds would not be obligated to hold PSD permits until the state develops and submits a revised PSD program that EPA approves, either because the state adopts the Tailoring Rule thresholds or because the state demonstrates that it has adequate resources to administer a program covering GHGs at lower applicability thresholds. *See* 75 FR at 31518. However, as discussed later in this section, EPA issued a SIP call and FIP for the Jefferson County jurisdiction, and therefore did not narrow federal approval of LMAPCD’s PSD program.

Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call,” Final Rule (hereafter referred to as the “SIP call”). *See* 75 FR 77698. The rule finalized findings of substantial inadequacy and SIP call for 15 state and local permitting authorities (including Jefferson County) where the existing SIP-approved PSD program did not provide authority to regulate GHGs. EPA explained that if a state identified in the SIP call failed to submit the required corrective SIP revision by the applicable deadline, EPA would promulgate a FIP under CAA section 110(c)(1)(A) for that state to govern PSD permitting for GHGs. LMAPCD requested a SIP call deadline of January 1, 2011, to provide its corrective SIP with the understanding that EPA would put a FIP in place for Jefferson County soon after that date if a SIP revision was not provided. On January 14, 2011, EPA finalized a FIP for Jefferson County in the rulemaking “Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan for Jefferson County, KY,” Final Rule (hereafter referred to as “Jefferson County GHG FIP”). *See* 76 FR 2581. This rulemaking established a FIP for Jefferson County because LMAPCD, through KDAQ, was unable to submit, by its January 1, 2011, deadline, the corrective SIP revision to apply its PSD program to sources of GHG.⁸ The FIP was put in place to ensure that a permitting authority (i.e., EPA) would be available to issue preconstruction PSD permits to GHG-emitting sources in Jefferson County, if necessary.

⁸ EPA’s action on January 14, 2011, to put a FIP in place for Jefferson County, Kentucky does not relate to the rest of Kentucky, as the Commonwealth, through KDAQ submitted a corrective SIP revision to address the remainder of Kentucky on December 13, 2010. KDAQ’s SIP revision to adopt the GHG Tailoring Rule thresholds for all portions of Kentucky, except Jefferson County, was approved by EPA on December 29, 2010 (75 FR 81868).

B. Jefferson County's Actions

In response to EPA's request in the GHG Tailoring Rule that permitting authorities confirm whether their SIPs provide authority to implement the GHG Tailoring Rule thresholds, LMAPCD provided a letter (commonly referred to as the 60-day letter) to EPA on August 2, 2010, explaining that LMAPCD... "[i]s authorized in its existing SIP to apply the meaning of the term "subject to regulation" established by EPA in the GHG Tailoring Rule in both the PSD and title V permitting programs." LMAPCD further explained that it would need to amend its SIP for Jefferson County to enable it to implement the GHG Tailoring Rule thresholds. See the docket for this proposed rulemaking for a copy of LMAPCD's 60-day letter.

However, on October 4, 2010, in response to EPA's request in the September 2, 2010, proposed SIP call Rule, LMAPCD submitted a letter to EPA changing its view of whether Jefferson County's SIP-approved PSD regulations provided authority to regulate GHGs (referred to as the 30-day letter). Jefferson County's 30-day letter acknowledged that while its existing SIP could be interpreted as providing the Agency authority to issue PSD permits to GHG-emitting sources, this interpretation would be a departure from its past practice of utilizing rulemaking procedures to update the SIP to incorporate revised EPA regulations." See Docket ID: EPA-R04-OAR-2011-0227 for LMAPCD's October 4, 2010, 30-day letter. In a follow-up letter dated October 19, 2010, LMAPCD reiterated its position that it did not have the authority, under its existing SIP, to issue PSD permits to regulate GHG-emitting sources without going through rulemaking. *See* DOCKET ID: EPA-R04-OAR-2011-0227 for LMAPCD's October 19, 2010, follow-up letter.

With the final GHG SIP call (75 FR 77698) and the Jefferson County GHG FIP rulemaking (76 FR 2581), EPA took steps to ensure that LMAPCD, which did not interpret its existing SIP-approved PSD program to provide authority to issue PSD permits to GHG-emitting sources, would not be at risk for permitting interruptions related to GHG by either having EPA issue permits for GHG through a FIP or be in a position for EPA to use delegation to allow LMAPCD to issue permits related to GHGs. More detail regarding EPA's analysis of the proposed changes to the Jefferson County portion of the Kentucky SIP (as provided in the February 8, 2011, revision) is provided below.

C. EPA's Analysis of Jefferson County's SIP Revision to adopt the GHG Tailoring Rule

On February 8, 2011, KDAQ, on behalf of LMAPCD, submitted to EPA a revision to the Jefferson County portion of Kentucky's SIP to IBR NSR PSD requirements for GHG. Specifically, the February 8, 2011, SIP revision includes changes to LMAPCD's Regulation 2.05 - Prevention of Significant Deterioration of Air Quality (version 10) to provide authority to LMAPCD to regulate GHG under the PSD program; and establish appropriate PSD applicability thresholds for GHGs, consistent with EPA's Tailoring Rule.

LMAPCD is currently the SIP-approved permitting authority for the PSD program in Jefferson County, Kentucky. As mentioned above, LMAPCD does not interpret the current SIP-approved version of its PSD regulations at Regulation 2.05 (i.e., version 9), which IBR the federal PSD regulations, to be applicable to GHG. In correspondences dated October 4, 2010, and October 19, 2010, LMAPCD notified EPA that it did not have the authority to regulate GHG

under the PSD program, and thus was in the process of revising its regulations (the subject of this proposed action) to provide LMAPCD with this authority. The February 8, 2011 SIP revision IBR the federal PSD regulations at 40 CFR 52.21 as of July 2010 into Jefferson County Regulation 2.05 to include the relevant federal GHG Tailoring Rule revisions that provide LMAPCD with the authority to regulate GHG under the PSD program and establish the thresholds for GHG permitting applicability. The GHG Tailoring Rule changes that this proposed action would incorporate into the Jefferson County portion of Kentucky's SIP define the term "subject to regulation" for the PSD program and define "greenhouse gases" and "tons per year (tpy) carbon dioxide equivalent emissions" (CO₂e). Additionally, the changes specify the methodology for calculating an emissions increase for GHG, the applicable thresholds for GHG emissions subject to PSD, and the schedule for when the applicability thresholds take effect. *See* 75 FR at 31606-31607. EPA has preliminarily determined that these provisions, which provide LMAPCD with the authority to regulate GHG under the PSD program and establish the thresholds for GHG permitting applicability, are consistent with EPA's PSD regulations for GHG emitting sources as promulgated in the GHG Tailoring Rule and section 110 of the CAA. Therefore, EPA is proposing to approve the GHG PSD permitting revision into the Jefferson County portion of Kentucky's SIP. *See* GHG Tailoring Rule, 75 FR at 31561. In addition, EPA is proposing to rescind the FIP promulgated January 14, 2011, codified in 40 CFR 52.37(b)(7), that ensures the availability of a PSD-permitting authority for GHG-emitting sources in Jefferson County, Kentucky. This FIP will no longer be required once the proposed GHG PSD permitting revision has been approved into the Jefferson County portion of Kentucky's SIP.

III. What is EPA's Proposed Action for the NSR PM_{2.5} Rule?

A. Background on Fine Particulate Matter

Today's proposed action to revise the Jefferson County portion of the Kentucky SIP also regards EPA's "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})," Final Rule (NSR PM_{2.5} Rule), 73 FR 28321 (May 16, 2008). In the NSR PM_{2.5} Rule, EPA finalized regulations to implement the NSR program for the PM_{2.5} NAAQS. As a result of EPA's final NSR PM_{2.5} Rule, states were required to provide SIP revisions no later than May 16, 2011, to address these requirements for both the PSD and NNSR programs. Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions both address the PSD requirements for the PM_{2.5} NAAQS. More detail on the NSR PM_{2.5} Rule can be found in EPA's May 16, 2008, final rule and is summarized below.

Fine particles in the atmosphere are made up of a complex mixture of components. Common constituents include sulfate (SO₄); nitrate (NO₃); ammonium; elemental carbon; a great variety of organic compounds; and inorganic material (including metals, dust, sea salt, and other trace elements) generally referred to as "crustal" material, although it may contain material from other sources. Airborne particulate matter (PM) with a nominal aerodynamic diameter of 2.5 micrometers or less (a micrometer is one-millionth of a meter, and 2.5 micrometers is less than one-seventh the average width of a human hair) are considered to be "fine particles" and are also known as PM_{2.5}. "Primary" particles are emitted directly into the air as a solid or liquid particle (e.g., elemental carbon from diesel engines or fire activities, or condensable organic particles

from gasoline engines). “Secondary” particles (e.g., SO_4 and NO_3) form in the atmosphere as a result of various chemical reactions.

The health effects associated with exposure to $\text{PM}_{2.5}$ include potential aggravation of respiratory and cardiovascular disease (i.e., lung disease, decreased lung function, asthma attacks and certain cardiovascular issues). Epidemiological studies have indicated a correlation between elevated $\text{PM}_{2.5}$ levels and premature mortality. Groups considered especially sensitive to $\text{PM}_{2.5}$ exposure include older adults, children, and individuals with heart and lung diseases. For more details regarding health effects and $\text{PM}_{2.5}$ see EPA’s Web Site at <http://www.epa.gov/air/urbanair/pm/index.html> (See heading “Health”).

On July 18, 1997, EPA revised the NAAQS for PM to add new standards for fine particles, using $\text{PM}_{2.5}$ as the indicator. Previously, EPA used PM_{10} (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for $\text{PM}_{2.5}$, setting an annual standard at a level of 15.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) and a 24-hour standard at a level of 65 $\mu\text{g}/\text{m}^3$. *See* 62 FR 38652. At the time the 1997 primary standards were established, EPA also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of $\text{PM}_{2.5}$, such as visibility impairment, soiling, and materials damage. On October 17, 2006, EPA revised the primary and secondary 24-hour NAAQS for $\text{PM}_{2.5}$ to 35 $\mu\text{g}/\text{m}^3$ and retained the existing annual $\text{PM}_{2.5}$ NAAQS of 15.0 $\mu\text{g}/\text{m}^3$. *See* 71 FR 61236.

B. Implementation of NSR for the PM_{2.5} NAAQS

After EPA promulgated the NAAQS for PM_{2.5} in 1997, the Agency issued a guidance document entitled “Interim Implementation of New Source Review Requirements for PM_{2.5}.” John S. Seitz, EPA, October 23, 1997 (the “Seitz memo”). The Seitz memo was designed to help states implement NSR requirements pertaining to the new PM_{2.5} NAAQS in light of technical difficulties posed by PM_{2.5} at that time. Specifically, the Seitz memo stated: “PM-10 may properly be used as a surrogate for PM-2.5 in meeting NSR requirements until these difficulties are resolved” (the PM₁₀ Surrogate Policy).

EPA also issued a guidance document entitled “Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas” (the “2005 PM_{2.5} Nonattainment NSR Guidance”), on April 5, 2005, the date that EPA’s PM_{2.5} nonattainment area designations became effective for the 1997 NAAQS. This memorandum provided guidance on the implementation of the nonattainment major NSR provisions in PM_{2.5} nonattainment areas in the interim period between the effective date of the PM_{2.5} nonattainment area designations (April 5, 2005) and EPA’s promulgation of final PM_{2.5} NNSR regulations. Besides re-affirming the continuation of the PM₁₀ Surrogate Policy for PM_{2.5} attainment areas set forth in the Seitz memo, the 2005 PM_{2.5} Nonattainment NSR Guidance recommended that until EPA promulgated the PM_{2.5} major NSR regulations, “[s]tates should use a PM₁₀ nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM_{2.5} NAAQS.”

On May 16, 2008, EPA finalized a rule to implement the 1997 PM_{2.5} NAAQS, including changes to the NSR program. *See* 73 FR 28321. The 2008 NSR PM_{2.5} Rule revised the NSR

program requirements to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment and nonattainment areas. The 2008 NSR PM_{2.5} Rule requires that major stationary sources seeking permits must begin directly satisfying the PM_{2.5} requirements, as of the effective date of the rule, rather than relying on PM₁₀ as a surrogate, with two exceptions. The first exception is a “grandfathering” provision in the federal PSD program at 40 CFR 52.21(i)(1)(xi). This grandfathering provision applied to sources that had applied for, but had not yet received, a final and effective PSD permit before the July 15, 2008, effective date of the May 2008 final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo’s PM₁₀ Surrogate Policy for up to three years (until May 2011) or until the individual revised state PSD programs for PM_{2.5} are approved by EPA, whichever comes first. For additional information on the NSR PM_{2.5} Rule, see 73 FR 28321.⁹

On February 11, 2010, EPA proposed to repeal the grandfathering provision for PM_{2.5} contained in the federal PSD program at 40 CFR 52.21(i)(1)(xi) and to end early the PM₁₀ Surrogate Policy applicable in states that have a SIP-approved PSD program. *See* 75 FR 6827. In support of this proposal, EPA explained that the PM_{2.5} implementation issues that led to the adoption of the PM₁₀ Surrogate Policy in 1997 had been largely resolved to a degree sufficient for sources and permitting authorities to conduct meaningful permit-related PM_{2.5} analyses. On May 18, 2011, EPA took final action to repeal the PM_{2.5} grandfathering provision at 40 CFR

⁹ Additional information on this issue can also be found in an August 12, 2009, final order on a title V petition describing the use of PM₁₀ as a surrogate for PM_{2.5}. In the Matter of *Louisville Gas & Electric Company*, Petition No. IV-2008-3, Order on Petition (August 12, 2009)(available at http://www.epa.gov/region07/air/title5/petitiondb/petitions/lge_2nddecision2006.pdf).

52.21(i)(1)(xi). *See* 76 FR 28646. This final action ended the use of the 1997 PM₁₀ Surrogate Policy for PSD permits under the federal PSD program at 40 CFR 52.21. In effect, any PSD permit applicant previously covered by the grandfathering provision (for sources that completed and submitted a permit application before July 15, 2008)¹⁰ that did not have a final and effective PSD permit before the effective date of the repeal will not be able to rely on the 1997 PM₁₀ Surrogate Policy to satisfy the PSD requirements for PM_{2.5} unless the application includes a valid surrogacy demonstration. *See* 76 FR 28646. In the February 8, 2011, SIP revision, LMAPCD elected to IBR the grandfathering provision at 40 CFR 52.21(i)(1)(xi) in its PSD regulations at Regulation 2.05. However, since the rule is repealed, EPA is not taking action to approve this provision into the Jefferson County portion of the Kentucky SIP.

The NSR PM_{2.5} Rule also established the following NSR requirements to implement the PM_{2.5} NAAQS: (1) require NSR permits to address directly emitted PM_{2.5} and precursor pollutants; (2) establish significant emission rates for direct PM_{2.5} and precursor pollutants (including sulfur dioxide (SO₂) and NO_x); (3) establish PM_{2.5} emission offsets; and (4) require states to account for gases that condense to form particles (“condensables”) in PM_{2.5} and PM₁₀ emission limits in PSD or nonattainment NSR permits. In addition, the NNSR PM_{2.5} Rule gives states the option of allowing interpollutant trading for the purpose of precursor offsets under the

¹⁰ Sources that applied for a PSD permit under the federal PSD program on or after July 15, 2008, are already excluded from using the 1997 PM₁₀ Surrogate Policy as a means of satisfying the PSD requirements for PM_{2.5}. *See* 73 FR 28321.

PM_{2.5} NNSR program.¹¹ Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions address only the PSD requirements related to EPA's May 16, 2008, NSR PM_{2.5} Rule.

In the NSR PM_{2.5} Rule, EPA also revised the definition of "regulated NSR pollutant" for PSD and NNSR to add a paragraph providing that "particulate matter (PM) emissions, PM_{2.5} emissions and PM₁₀ emissions" shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, PM_{2.5} and PM₁₀ in permits issued. *See* 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and "Emissions Offset Interpretative Ruling" (40 CFR Part 51, Appendix S). A similar paragraph added to the NNSR rule does not include "particulate matter (PM) emissions." *See* 40 CFR 51.165(a)(1)(xxxvii)(D).

On March 12, 2012, EPA proposed a rulemaking to amend the definition of "regulated NSR pollutant" promulgated in the 2008 NSR PM_{2.5} Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i) and EPA's Emissions Offset Interpretative Ruling. *See* 77 FR 15656. The rulemaking proposes to remove the inadvertent requirement in the NSR PM_{2.5} Rule that the measurement of condensable "particulate matter emissions" be included as part of the measurement and regulation of "particulate matter emissions." The term "particulate matter emissions" includes particles that are larger than PM_{2.5} and PM₁₀ and is an

¹¹ On July 21, 2011, as a result of reconsidering the interpollutant (IPT) policy, EPA issued a memorandum indicating that the existing preferred precursor offset ratios associated with the IPT policy and promulgated in the NSR PM_{2.5} Rule were no longer considered approvable. The memorandum stated that any PM_{2.5} precursor offset ratio submitted as part of the NSR SIP for PM_{2.5} nonattainment areas would need to be accompanied by a technical demonstration exhibiting how the ratios are suitable for that particular nonattainment area. *See* Memorandum from Gina McCarthy to Regional Air Division Directors, "Revised Policy to Address Reconsideration of Interpollutant Trading Provisions for Fine Particles (PM_{2.5})" (July 21, 2011) (available at <http://www.epa.gov/nsr/documents/20110721PM25InterpollutantTradingPolicy.pdf>)

indicator measured under various New Source Performance Standards (NSPS) (40 CFR part 60).¹² Jefferson County's February 11, 2011, SIP revision IBR EPA's definition for regulated NSR pollutant for condensables (at 40 CFR 52.21(b)(50)(vi)), including the term "particulate matter emissions", as promulgated in the NSR PM_{2.5} Rule. EPA's review of Jefferson County's February 11, 2011, SIP revision with regards to the NSR PM_{2.5} Rule condensable provision is provided below in Section III.

C. EPA's Analysis of Jefferson County's SIP Revision to adopt the NSR PM_{2.5} PSD Permitting Requirements

Jefferson County's Regulation 2.05 – *Prevention of Significant Deterioration of Air Quality* IBR the provisions at 40 CFR 52.21, as amended in the NSR PM_{2.5} Rule for PSD. Specifically, Jefferson County's June 1, 2009, and February 8, 2011, proposed SIP revisions IBR the following NSR PM_{2.5} provisions for PSD: (1) requirement for NSR permits to address directly emitted PM_{2.5} and precursor pollutants; (2) significant emission rates for direct PM_{2.5} and precursor pollutants (SO₂ and NO_x); (3) PSD and NNSR requirement of states to address condensable PM in establishing enforceable emission limits for PM₁₀ or PM_{2.5}; and (4) PM_{2.5} emission offsets Regarding the PM₁₀ "grandfathering" provision, Jefferson County's SIP revisions include the provision at 40 CFR 52.21(i)(1)(ix) promulgated in the NSR PM_{2.5} Rule. As mentioned in Section III.B, EPA took final action to repeal the PM₁₀ grandfathering

¹² In addition to the NSPS for PM, it is noted that states regulated "particulate matter emissions" for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

provision on May 18, 2011. *See* 76 FR 28646. Therefore, EPA is not taking action to approve this provision into the Jefferson County portion of the Kentucky SIP. Jefferson County will need to update its PSD provisions to reflect the repeal of the PM₁₀ grandfathering provision in federal regulations at 40 CFR 52.21. At this time Jefferson County's PSD regulations are approvable because they are at least as stringent as the current federal regulations, and are consistent with section 110 of the CAA.

Jefferson County's February 11, 2011 SIP revision also IBR, into the Jefferson County portion of the Kentucky SIP, PSD regulations regarding the requirement to address condensable PM in applicability determinations and in establishing enforceable emission limits in PSD and NNSR permits, as established in the NSR PM_{2.5} Rule. As discussed above in Section III.B, under a separate action, EPA has proposed to correct the inadvertent inclusion of "particulate matter emissions" in the definition of "regulated NSR pollutant" as an indicator for which condensable emissions must be addressed. *See* 77 FR 75656 (March 16, 2012). Further, on May 14, 2012, the State of Kentucky, on behalf of LMAPCD, provided a letter to EPA with clarification of Jefferson County's intent in light of EPA's March 12, 2012, proposed rulemaking. Specifically, in the letter, the State of Kentucky requested that EPA not approve (into the Jefferson County portion of the SIP) the term "particulate matter emissions" (at Regulation 2.05) as part of the definition for "regulated NSR pollutant" that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for PM. Therefore given the state's and LMAPCD's request and EPA's intention to amend the definition of "regulated NSR pollutant," EPA is not proposing action to approve the terminology "particulate matter emissions" into the Jefferson County portion of the Kentucky

SIP (at Regulation 2.05) for the condensable provision at the definition of “regulated NSR pollutant.” EPA is, however, proposing to approve into the SIP at Regulation 2.05 the remaining condensable requirement at 40 CFR 51.166(b)(49)(vi) that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for PM_{2.5} and PM₁₀. EPA has preliminarily determined that Jefferson County’s June 1, 2009, and February 8, 2011, SIP revisions are consistent with the NSR PM_{2.5} Rule for PSD and with section 110 of the CAA. *See* NSR PM_{2.5} Rule, 75 FR 31514.

IV. What is EPA’s Proposed Action for the Phase II Rule?

A. Background

Today’s proposed action on Jefferson County’s portion of the Kentucky SIP also relates to EPA’s November 29, 2005, Phase II Rule. *See* 70 FR 71612. In the Phase II Rule, EPA made a number of changes to the NSR rules including: recognizing NO_x as an ozone precursor for PSD purposes; changing the NNSR rules that establish major stationary thresholds (marginal, moderate, serious, severe, and extreme nonattainment area classifications) and significant emission rates for the 8-hour ozone, PM₁₀ and carbon monoxide NAAQS; revising the criteria for crediting emission reductions credits from operation shutdowns and curtailments as offsets, and changing offset ratios for marginal, moderate, serious, severe, and extreme ozone nonattainment areas. The following provides the background for the Phase II Rule requirements for NO_x as an ozone precursor.

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million – also referred to as the 1997 8-hour ozone NAAQS. On April 30, 2004, EPA designated areas as attainment, nonattainment and unclassifiable for the 1997 8-hour ozone NAAQS. In addition, as part of the framework to implement the 1997 8-hour ozone NAAQS, EPA promulgated an implementation rule in two phases (Phase I and II). The Phase I Rule (effective on June 15, 2004) provided the implementation requirements for designating areas under subpart 1 and subpart 2 of the CAA. *See* 69 FR 23951 (April 30, 2004).

On November 29, 2005, EPA promulgated the second phase for implementation provisions related to the 1997 8-hour ozone NAAQS – also known as the Phase II Rule. *See* 70 FR 71612. The Phase II Rule addressed control and planning requirements as they applied to areas designated nonattainment for the 1997 8-hour ozone NAAQS, such as reasonably available control technology, reasonably available control measures, reasonable further progress, modeling and attainment demonstrations, NSR, and the impact to reformulated gas for the 1997 8-hour ozone NAAQS transition. The Phase II Rule NSR requirements include, among other changes, a provision stating that NO_x is an ozone precursor. *See* 70 FR at 71679. In the Phase II Rule, EPA stated as follows:

The EPA has recognized NO_x as an ozone precursor in several national rules because of its contribution to ozone transport and the ozone nonattainment problem. The EPA's recognition of NO_x as an ozone precursor is supported by scientific studies, which have long recognized the role of NO_x in ozone formation and transport. Such formation and transport is not limited to

nonattainment areas. Therefore, we believe NO_x should be treated consistently as an ozone precursor in both our PSD and nonattainment NSR regulations. For these reasons, we have promulgated final regulations providing that NO_x is an ozone precursor in attainment areas.

The Phase II Rule made changes to federal regulations 40 CFR 51.165, 51.166 and 52.21 (which governs the NNSR and PSD permitting programs respectively). Pursuant to these requirements, states were required to submit SIP revisions adopting the federal requirements of the Phase II Rule (at 40 CFR 51.165, 51.166 and 52.21) into their SIP no later than June 15, 2007. Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions both address the federal PSD-only provisions requirements promulgated in the Phase II rule recognizing NO_x as an ozone precursor (at 40 CFR 52.21).¹³

B. EPA's Analysis of Jefferson County's SIP Revisions to adopt the Phase II Rule.

Jefferson County's June 1, 2009, SIP revision updated LMAPCD's PSD program to include NO_x as an ozone precursor for PSD permitting, consistent with changes to the federal regulations set forth in the Phase II Rule at 40 CFR 52.21. Subsequently, on February 8, 2011, KDAQ, submitted a SIP revision which included the June 1, 2009, changes in addition to other federal PSD permitting updates to the Jefferson County portion of the Kentucky SIP. Jefferson

¹³ Jefferson County's SIP submittals proposed for approval in this rulemaking do not include NNSR provisions for the Phase II Rule. These permitting requirements (at Regulation 2.04) are still under development by LMAPCD.

County's SIP revisions IBR the federal PSD regulations (at 40 CFR 52.21) to include the NOx as a precursor PSD-only permitting provisions promulgated in the Phase II Rule into the Jefferson County portion of the Kentucky SIP at Regulation 2.05 – Prevention of Significant Deterioration of Air Quality (version 10) as of July 1, 2010. EPA has preliminarily determined that Jefferson County's SIP revisions are consistent with the PSD Phase II Rule permitting requirements and section 110 of the CAA.

V. What are EPA's Proposed Actions for NSR Reform and Reasonable Possibility?

A. Background

On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52 regarding the CAA's PSD and NNSR programs. On November 7, 2003 (68 FR 63021), EPA published a notice of final action on the reconsideration of the December 31, 2002, final rule changes. The December 31, 2002, and the November 7, 2003, final actions are collectively referred to as the "2002 NSR Reform Rules." The 2002 NSR Reform Rules are part of EPA's implementation of parts C and D of title I of the CAA, 42 U.S.C. 7470-7515. Part C of title I of the CAA, 42 U.S.C. 7470-7492, consists of the PSD program and applies to attainment and unclassifiable areas. Part D of title I of the CAA, 42 U.S.C. 7501-7515, includes the NNSR program and applies in nonattainment areas. Collectively, the PSD and NNSR programs are referred to as the "New Source Review" or NSR programs.

The 2002 NSR Reform Rules made changes to five areas of the NSR programs. In summary, the 2002 NSR Reform Rules: (1) provide a new method for determining baseline actual emissions; (2) adopt an actual-to-projected-actual methodology for determining whether a

major modification has occurred; (3) allow major stationary sources to comply with plant-wide applicability limits (PALs) to avoid having a significant emissions increase that triggers the requirements of the major NSR program; (4) provide a new applicability provision for emissions units that are designated clean units; and (5) exclude pollution control projects (PCPs) from the definition of “physical change or change in the method of operation.” On November 7, 2003 (68 FR 63021), EPA published a notice of final action on its reconsideration of the 2002 NSR Reform Rules, which added a definition for “replacement unit” and clarified an issue regarding PALs. For additional information on the 2002 NSR Reform Rules, see 67 FR 80186 (December 31, 2002) and <http://www.epa.gov/nsr>.

After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), industry, state, and environmental petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA’s 1980 NSR Rules, 45 FR 52676 (August 7, 1980). On June 24, 2005, the United States Court of Appeals for the District of Columbia (D.C. Circuit Court) issued a decision on the challenges to the 2002 NSR Reform Rules. *New York v. U.S. EPA*, 413 F.3d 3 (D.C. Cir. 2005). In summary, the D.C. Circuit Court vacated portions of the rules pertaining to clean units and PCPs, remanded a portion of the rules regarding recordkeeping and the term “reasonable possibility” found in 40 CFR 52.21(r)(6) and 40 CFR 51.165(a)(6) and 51.166(r)(6), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. On June 13, 2007 (72 FR 32526), EPA took final action to revise the 2002 NSR Reform Rules to remove from federal law all provisions pertaining to clean units and the PCPs exemption that were vacated by the D.C. Circuit Court.

The 2002 NSR Reform Rules required that state agencies adopt and submit revisions to their SIP permitting programs implementing the minimum program elements of the 2002 NSR Reform Rules no later than January 2, 2006. State agencies may meet the requirements of 40 CFR 51 and the 2002 NSR Reform Rules with different but equivalent regulations.

With regard to the remanded portions of the 2002 NSR Reform Rules related to recordkeeping, the U.S. Court of Appeals remanded to EPA either to provide an acceptable explanation for its “reasonable possibility” standard or devise an appropriate alternative. To satisfy the courts, on December 21, 2007, EPA took final action to clarify that a “reasonable possibility” applies where source emissions equal or exceed 50 percent of the CAA NSR significance levels for any pollutant. *See* “Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping,” Final Rule, 72 FR 72607 (December 21, 2007) (the Reasonable Possibility Rule). The “reasonable possibility” provision identifies for sources and reviewing authorities the circumstances under which a major stationary source undergoing a modification that does not trigger major NSR must keep records. EPA’s December 21, 2007, final rule on the record-keeping and reporting provisions also explains state obligations with regard to the reasonable possibility related rule changes.¹⁴ *See* 72 FR at 72613-72614. The final rule gave states and local permitting authorities three years from publication to submit revisions to incorporate the reasonable possibility provisions or to submit notice to EPA that their regulations fulfill these requirements.

¹⁴ On January 14, 2009, EPA denied a petition by the State of New Jersey (submitted February 8, 2008) for reconsideration and stay of the December 21, 2007, final rule for “reasonable possibility.” However, on March 11, 2009, New Jersey reiterated its request for reconsideration, which EPA granted on April 24, 2009. EPA has not taken action on the reconsideration therefore, the current recordkeeping rules established in the December 21, 2007, final rule are approvable.

On June 1, 2009, and February 8, 2011, KDAQ, on behalf of LMAPCD, submitted to EPA revisions to the Jefferson County portion of Kentucky's SIP to IBR the federal PSD permitting regulations promulgated in the 2002 NSR Reform Rule and the Reasonable Possibility Rule. EPA is now proposing to approve these SIP revisions consistent with section 110 of the CAA.

B. EPA's Analysis of Jefferson County's SIP Revision to adopt the NSR Reform and Reasonable Possibility.

As mentioned in Section I, LMAPCD's PSD Program at Regulation 2.05- *Prevention of Significant Deterioration for Air Quality* establishes the preconstruction review program as required under part C of title I of the CAA. The changes to LMAPCD's PSD rules, which EPA is now proposing to approve into the Jefferson County portion of the Kentucky SIP, were established to update the existing PSD Program to meet the requirements of the 2002 NSR Reform Rules. Jefferson County's SIP revisions IBR the 2002 NSR Reform PSD changes regarding baseline actual emissions, actual-to-projected-actual applicability tests, and PAL provisions. Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions both address the federal PSD requirements promulgated in the 2002 NSR Reform rules. The proposed revisions explicitly exclude the PCPs and clean unit portions of the 2002 NSR Reform Rules that were vacated as part of the D.C. Circuit Court's June 2005 decision.

With regard to the remanded portions of the 2002 NSR Reform Rules related to record-keeping and EPA's December 21, 2007, clarifications of the term "reasonable possibility" (72 FR 72607), Jefferson County's SIP revisions IBR the federal revised "reasonable possibility"

provisions at 40 CFR 52.21(r)(6). Thus, LMAPCD's recordkeeping and reporting provisions are the same as the federal requirements promulgated in EPA's December 21, 2007, final action.

In addition to incorporating the federal PSD regulations, Jefferson County's February 8, 2011, SIP revision includes a technical support document (TSD), which assesses the impact of adopting the 2002 NSR Reform provisions into Jefferson County's PSD permitting program and the air quality impacts. As mentioned above, LMAPCD has a SIP-approved PSD program. However, due to the limited number of sources in Jefferson County, the permitting program does not assess many major PSD permits. In fact, in nearly ten years, LMAPCD has only analyzed two projects under PSD. Most sources in Jefferson County are permitted through LMAPCD's minor source program, which allows sources to take emission limits to avoid PSD permitting. Additionally, regarding criteria pollutants, the TSD explains that sources typically subject to PSD permitting (i.e. point sources) have not been the primary driver for past or current nonattainment NAAQS designations in Jefferson County. See the TSD in the Docket ID No. EPA-R04-OAR-2011-0227.

LMAPCD's TSD concluded that adoption of the 2002 NSR Reform improvements would not impede the LMAPCD's ability to comply with the NAAQS or any reasonable progress towards continued maintenance. After evaluating Jefferson County's SIP revision, and the TSD provided with the February 8, 2011, SIP revision, EPA has determined that the proposed SIP revisions to adopt NSR Reform and reasonable possibility provisions are consistent with the federal program requirements for the preparation, adoption and submittal of implementation plans for the PSD of air quality, set forth at 40 CFR 52.21, and the 2002 NSR Reform Rule.

VI. What is EPA's Proposed Action for the Automatic Rescission Clause

A. Jefferson County's Proposed Automatic Rescission Clause.

Jefferson County's February 8, 2011, proposed SIP revision adds a new section to Regulation 2.05, Section 2 – Effect of Stay, Vacatur, or Withdrawal, also known as an automatic rescission clause. This clause provides that in the event that EPA or a federal court stays, vacates, or withdraws any section or subsection of 40 CFR 52.21, that section or subsection shall automatically be deemed stayed, vacated or withdrawn from Jefferson County's SIP-approved PSD program at Regulation 2.05. The period of delay resulting from a stay would begin and end for purposes of Jefferson County's SIP on the date specified by EPA in a Federal Register notice announcing the stay. Likewise, any provision that is vacated or withdrawn shall be null and void for purposes of Jefferson County's SIP as of the date specified in the notice of vacatur or withdrawal published by EPA in a Federal Register notice.

B. EPA's Analysis of the Approvability of Jefferson County's Automatic Rescission Clause.

EPA has preliminarily concluded that Jefferson County's automatic rescission clause is approvable. In assessing the approvability of this provision, EPA considered two key factors: (1) whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission clause, and (2) whether any future change to the SIP that occurs as a result of the automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering EPA or federal court action (e.g., the extent of an administrative or judicial stay). These criteria are derived from the SIP revision procedures set forth in the CAA

and federal regulations.

Regarding public notice, CAA section 110(l) provides that any revision to a SIP submitted by a state to EPA for approval “shall be adopted by such State after reasonable notice and public hearing.” In accordance with CAA section 110(l), the LMAPCD followed applicable notice-and-comment procedures prior to adopting the automatic rescission clause. Thus, the public is on notice that the Jefferson County portion of the Kentucky SIP will automatically update to reflect any EPA or federal action that stays, withdraws, or vacates any portion of 40 CFR 52.21. In addition, the automatic rescission clause provides that no change to the SIP will occur until EPA publishes a Federal Register notice announcing that a portion of 40 CFR 52.21 has been stayed, vacated, or withdrawn. Thus, the timing and extent of any future SIP change resulting from the automatic rescission clause will be clear to both the regulated community and the general public.

EPA’s consideration of whether any SIP change resulting from the proposed automatic rescission clause would be consistent with EPA’s interpretation of the effect of the triggering action on federal regulations is based on 40 CFR 51.105. Under 40 CFR 51.105, “[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.” *See* 40 CFR 51.105. While EPA is approving the automatic updating of the Jefferson County portion of the Kentucky SIP to reflect the stay, withdrawal or vacatur of any section or subsection of 40 CFR 52.21, there could be varying interpretations of the timing and extent of changes to 40 CFR 52.21 resulting from a given EPA or federal court action. By tying the automatic updating of the SIP to EPA’s publication of a Federal Register notice announcing the change to 40 CFR 52.21,

the proposed automatic rescission clause ensures that any change to the SIP will be consistent with EPA's interpretation of the triggering action.

VII. Proposed Actions

EPA is proposing to approve Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions which adopt federal requirements for NSR PSD permitting. Jefferson County's SIP revisions consist of changes to the LMAPCD Air Quality Regulation 2.05 – *Prevention of Significant Deterioration of Air Quality* and address several NSR PSD permitting requirements promulgated at 40 CFR 52.21. Specifically, Jefferson County's June 1, 2009, SIP revision adopts federal regulations relating to PSD requirements for the NSR PM_{2.5} Rule, the Phase II Rule, the 2002 NSR Reform Rule, and the NSR Reasonable Possibility Rule into the Jefferson County portion of the Kentucky SIP. Jefferson County's February 8, 2011, proposed SIP revision includes all of the aforementioned updates to LMAPCD's PSD regulations but also provides Jefferson County with the authority to regulate GHGs under its PSD program, establishes appropriate emissions thresholds for determining PSD applicability with respect to new and modified GHG-emitting sources (in accordance with EPA's Tailoring Rule), and incorporates an automatic rescission clause for 40 CFR 52.21 regulations. EPA has preliminarily determined that these SIP revisions are approvable because they are in accordance with the CAA and EPA regulations regarding PSD permitting. In addition, EPA is proposing to rescind the FIP promulgated on January 14, 2011 at 40 CFR 52.37(b)(7) once the proposed GHG PSD permitting revision has been approved into the Jefferson County portion of the Kentucky SIP.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions merely approve state law as meeting federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these proposed actions:

- are not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the Commonwealth, and it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Greenhouse Gas, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 24, 2012

Signed: A. Stanley Meiburg

Acting Regional Administrator,
Region 4.

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